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10 UNITED STATES DISTRICT COURT  
11 EASTERN DISTRICT OF WASHINGTON

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 vs.

15 EDGAR OMAR HERRERA FARIAS,

16 Defendant,

4:15-CR-6049-EFS-16

United States' Fed. R. Evid. 609  
Notice

17 Plaintiff, United States of America, by and through Joseph H. Harrington,  
18 United States Attorney for the Eastern District of Washington, and Stephanie  
19 Van Marter and Caitlin Baunsgard, Assistant United States Attorneys for the  
20 Eastern District of Washington, submits the following memorandum to notify  
21 this Court and the Defendant that the United States' intends to use the  
22 Defendant's prior felony convictions as impeachment evidence if the Defendant  
23 testifies at trial. The United States is not seeking a pre-trial ruling on this issue –  
24 the United States is simply providing the requisite notice.  
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## I. INTRODUCTION

The Defendant is currently before the Court charged by way of Second Superseding Indictment, returned on December 6, 2016. ECF. 105. The Defendant is charged with Conspiracy to Distribute 500 Grams or More of a Mixture or Substance Containing a Detectable Amount of Methamphetamine, 5 Kilograms or More of Cocaine, 1 Kilogram or More of Heroin, and 400 Grams or More of Fentanyl, in violation of 21 U.S.C. § 846. *See id.* The most relevant date for the alleged offense is January 2010. *See id.* Should the Defendant choose to testify at trial, the United States will seek to impeach him with the prior felony convictions of the Defendant congruent with Fed. R. Evid. 609.

## II. AUTHORITY

### A. Federal Rule of Evidence 609 Allows Evidence of a Defendant's Prior Felony Convictions for Purposes of Attacking Credibility.

Federal Rule of Evidence 609(a) allows evidence of prior criminal felony convictions of a defendant-witness for impeachment purposes if the “probative value of the evidence outweighs its prejudicial effect to the defendant.” Fed. R. Evid. 609(a)(1). This rule of admissibility is limited for prior convictions that are more than ten years old. Fed. R. Evid. 609(b)(1). The ten-year period is defined as beginning on the later of “the date of conviction or date of the release of the witness from confinement imposed for that conviction.” Fed. R. Evid. 609(b).

1 The Ninth Circuit has outlined a five-factor test for balancing the  
2 probative value of a defendant's prior conviction against its potentially unfair  
3 prejudicial effect. The factors are:  
4

5 (1) the impeachment value of the prior crime; (2) the  
6 point in time of conviction and the defendant's  
7 subsequent history; (3) the similarity between the past  
8 crime and the charged crime; (4) the importance of the  
9 defendant's testimony; and (5) the centrality of the  
10 defendant's credibility.

11 *United States v. Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004)  
12 (citation omitted) (declined to follow on other grounds *People v. Clemens*, --  
13 P.3d -- (2013)). The district court need not explicitly analyze each of the five  
14 factors; however, "the record should reveal, at a minimum, that the trial judge  
15 was aware of the requirements of Rule 609(a)(1)." *Id.* (citation omitted). "What  
16 matters is the balance of all five factors." *United States v. Alexander*, 48 F.3d  
17 1477, 1488 (9th Cir. 1995).  
18

19 If a defendant testifies and denies committing the charged offense, both  
20 the defendant's testimony and credibility become critical issues. *Id.* at 1489. A  
21 defendant's prior convictions thus have a substantial impeachment value and  
22 assessing her credibility can outweigh even highly prejudicial convictions. *Id.* at  
23 1488-89. "[A]bsent exceptional circumstances, evidence of a prior conviction  
24 admitted for impeachment purposes may not include collateral details and  
25 circumstances attendant upon the conviction. Generally, only the prior  
26  
27

conviction, its general nature, and punishment of a felony range [are] fair game for testing the defendant's credibility." *United States v. Osazuwa*, 564 F.3d 1169, 1175 (9th Cir. 2009) (quotation marks and citations omitted).

**B. The Defendant's Relevant Prior Felony Conviction**

Based on the information the United States currently has available as of the date of this filing, the United States submits the Defendant's following prior felony conviction would fall into the 10-year window under Rule 609 and intends to utilize it:

Date of Offense	Description of Offense	Jurisdiction	Date of Disposition	Disposition
03/22/2012	Controlled Substance Violation	Yakima County Superior Court	08/23/2012	3 months prison, 12 months community custody

**C. The Defendant's Prior Convictions are Admissible under the Ninth Circuit's Five-Factor Test.**

Whether or not the Defendant stipulates to his status as a felon, the United States will seek to use the Defendant's prior felony conviction as impeachment evidence at trial if the Defendant testifies. This prior convictions is admissible in accordance with the Ninth Circuit's five-factor test. *See Martinez-Martinez*, 369 F.3d at 1088.

First, the impeachment value of the Defendant's prior conviction is significant. The credibility of any witness, but especially the credibility of a Defendant-witness is a key component of the jury's deliberations. Thus the

1 jurors have a right to know if the Defendant has any prior felony convictions.  
2 Specifically, prior drug conviction bears on the defendant's veracity. The Ninth  
3 Circuit has held that prior drug convictions are probative of veracity, regardless  
4 of type or level of drug offense. *Alexander*, 48 F.3d at 1488; *United States v.*  
5 *Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997).  
6

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8 Second, as to the timing of the prior conviction, the conviction appears to  
9 fall within the 10-year period described in Rule 609. Fed. R. Evid. 609(a)(1).  
10 Therefore, the evidence is not impermissibly stale. *Alexander*, 48 F.3d at 1488  
11 (citation omitted).  
12

13 Third, as to the alleged offenses similarity with prior conviction, this  
14 Court can ameliorate that potential prejudice by following the course charted in  
15 prior cases when a party has been permitted to introduce the fact of conviction,  
16 but not the nature of it. *See Osazuwa*, 564 F.3d at 1175; *see also United States*  
17 *v. Hursh*, 217 F.3d 761,768 (9th Cir. 2000) ("the evidence of [defendant]'s prior  
18 felony conviction was 'sanitized' meaning the nature of the felony . . . was not  
19 discussed"). Specifically, the prior conviction can be sanitized by allowing the  
20 United States to refer to each of them as prior "felony conviction."  
21  
22

23  
24 As to the fourth and fifth factors, if the Defendant testifies his credibility  
25 will be a crucial part of the jury's deliberations. *See Alexander*, 48 F.3d at 1489  
26 ("[w]hen a defendant takes the stand and denies having committed the charged  
27

1 offense, he places his credibility directly at issue”); *United States v. Hickok*, 77  
2 F.3d 992, 1007 (9th Cir. 1996) (“[t]he law is clear that when a defendant decides  
3 to take the stand and tell the jury a story, he does so at his own risk”).  
4

5 **D. General Impeachment**

6 Lastly, the United States reserves any of the prior felony conviction noted  
7 above for potential general impeachment, even if not used as direct  
8 impeachment under FRE 609. If the Defendant takes the witness stand and  
9 denies, for example, that he has ever dealt with drugs or otherwise opens the  
10 door to the admissibility of any of the prior felony conviction, then the United  
11 State will seek to confront the Defendant with the fact of the prior felony  
12 conviction after obtaining a ruling from the Court.  
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14

15 **III. CONCLUSION**

16 Therefore, in accordance with Fed. R. Evid. 609, the United States is  
17 providing notice that should the Defendant intend to testify, the United States  
18 will seek to introduce evidence of the Defendant’s prior conviction for  
19 impeachment purposes.  
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22 Dated: March 3, 2017

23 JOSEPH H. HARRINGTON  
24 United States Attorney

25 s/ Caitlin Baunsgard  
26 Caitlin Baunsgard  
27 Assistant United States Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on February 28, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Pete Schweda: [pschweda@wsmattorneys.com](mailto:pschweda@wsmattorneys.com),  
[kschroeder@wsmattorneys.com](mailto:kschroeder@wsmattorneys.com)

**s/ Caitlin A. Baunsgard**  
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Assistant United States Attorney